MGI Securities Sdn Bhd v Teong Teck Leng & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D6–22–2760 OF 1998
REKHRAJ J
25 NOVEMBER 1999

Civil Procedure *— Res judicata — Decision, finality of earlier decision — Plaintiff's application to summarily strike out defendants' defence dismissed — Appeal against decision subsequently withdrawn — Plaintiff elected not to lead evidence at trial — Allegation that defence lacked sufficient traverse in plea, thereby amounting to admissions — Whether issue of substantiality of defence open for re-litigation at trial*

Civil Procedure *— Defence — Denials — Whether lacked sufficient traverse in plea — Whether amounted to admissions*

The plaintiffs who were licensed stock brokers claimed to have acted on the oral instructions of the second and third defendants, who represented the first defendant, to purchase shares. The plaintiffs brought an action against the defendants claiming for losses incurred. In their defence, the defendants categorically denied each of the paragraphs of the statement of claim. The plaintiffs applied to strike out the defendants' defence pursuant to O 18 r 19 of the Rules of the High Court 1980 as they claimed that the defence disclosed no reasonable defence. The senior assistant registrar dismissed the plaintiffs' application and the plaintiffs appealed to the judge in chambers where the appeal was withdrawn with the consent of the solicitors in favour of an early trial date. At the trial, the plaintiffs withdrew proceedings against the first defendant and elected not to lead evidence against the other defendants and submitted that the defendants' defence lacked sufficient traverse in the plea, thereby amounting to admissions on the part of the defendants.

Held, dismissing the claim:

(1) As the plaintiffs had withdrawn their appeal on the finding of the senior assistant registrar that the defence was a specific defence without any clear admission on the part of the defendant, the plaintiffs were now estopped from adducing or advancing the same argument to contradict that decision which had become res judicata (see p 358B–C); *Asia Commercial Finance (M) Bhd v Kawal Reliti Sdn Bhd* [1995] 3 MLJ 189 followed.

(2) Further, upon reading the defence, there were no clear or unequivocal admissions of any fact by the defendants. The plaintiffs were not entitled to ask the court to read meanings into those pleadings as admissions which upon a fair construction of the defence as a whole, do not appear to be so as to fix the defence with an admission (see p 358C–D); *Ash & Anor v Hutchinson & Co (Publishers) Ltd & Ors* [1936] 1 Ch 489 followed.

(3) The onus of proof shifted to the plaintiff to prove its case in accordance with ss 101 and 102 of the Evidence Act 1950 and as the plaintiff chose not to lead evidence of the oral agreements through witnesses, the court could only hold that there was no evidence to adjudicate upon (see p 358E–F).

[Bahasa Malaysia summary

Plaintif-plaintif merupakan broker-broker saham yang mendakwa telah bertindak menurut arahan-arahan secara lisan daripada defendan-defendan kedua dan ketiga, yang mewakili defendan pertama, untuk membeli saham. Plaintif-plaintif telah memulakan tindakan terhadap defendan-defendan menuntut kerugian yang dialami. Di dalam pembelaan mereka, defendan-defendan telah menafikan setiap perenggan di dalam pernyataan tuntutan tersebut. Plaintif-plaintif telah memohon untuk membatalkan pembelaan defendan-defendan menurut A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 kerana mereka mendakwa bahawa pembelaan tidak mengemukakan pembelaan yang munasabah. Penolong kanan pendaftar telah menolak permohonan plaintif-plaintif dan plaintif-plaintif telah merayu kepada hakim dalam kamar di mana rayuan tersebut telah ditarik balik dengan kebenaran peguamcara-peguamcara untuk suatu tarikh lebih awal. Di dalam perbicaraan, plaintif-plaintif telah menarik balik prosiding terhadap defendan pertama dan memilih untuk tidak mengemukakan keterangan terhadap defendan-defendan lain dan menghujahkan bahawa pembelaan defendan-defendan kekurangan traverse yang mencukupi di dalam plea, dan dengan itu terjumlah kepada pengakuan di pihak defendan-defendan.

Diputuskan, menolak tuntutan tersebut:

(1) Memandangkan plaintif-plaintif telah menarik balik rayuan mereka setelah mendapati penolong kanan pendaftar bahawa pembelaan tersebut merupakan pembelaan yang khusus tanpa apa-apa pengakuan jelas di pihak defendan, plaintif-plaintif sekarang adalah diestopkan daripada mengemukakan atau mendahulukan hujah yang sama untuk menyangkal bahawa keputusan tersebut telah menjadi res judicata (lihat ms 358B–C); *Asia Commercial Finance (M) Bhd v Kawal Reliti Sdn Bhd* [1995] 3 MLJ 189 diikut.

(2) Tambahan pula, setelah membaca pembelaan tersebut, tiada pengakuan yang jelas atau yang tidak taksa tentang apa-apa fakta oleh defendan-defendan. Plaintif-plaintif tidak berhak untuk meminta mahkamah membaca maksud pliding-pliding tersebut sebagai pengakuan jika setelah meneliti dengan adil pembelaan itu secara keseluruhan, pembelaan tersebut tidak kelihatan seperti dibuat dengan suatu pengakuan (lihat ms 358C–D); *Ash & Anor v Hutchinson & Co (Publishers) Ltd & Ors* [1936] 1 Ch 489 diikut.

(3) Beban membukti berpindah kepada plaintif untuk membuktikan kesnya bersesuaian dengan ss 101 dan 102 Akta Keterangan 1950 dan oleh kerana plaintif telah memilih untuk tidak mengemukakan keterangan tentang perjanjian lisan melalui saksi, mahkamah hanya boleh memutuskan bahawa tidak ada keterangan untuk diadjudikasikan (lihat ms 358E–F).]

Notes

For cases on res judicata generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3959–4032.

For cases on defence, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3493–3508.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Reliti Sdn Bhd [1995] 3 MLJ 189 (folld)

Ash & Anor v Hutchinson & Co (Publishers) Ltd & Ors [1936] 1 Ch 489 (folld)

Legislation referred to

Evidence Act 1950 ss 101, 102
Rules of the High Court 1980 O 18 r 19

Chan Kok Keong (*Norazali bin Nordin* and *Raja Saidatul Akhma bte Raja Lope* with him) (*Chan & Assoc*) for the plaintiff.

Mohamed Haniff bin Khatri Abdulla (*Paramjit Singh* with him) (*Haniff & Rajendran*) for the defendants.

Rekhraj J: The plaintiffs are licensed stockbrokers. They claim that on or about 9 July 1996; the plaintiffs through their two representatives, namely En Khair Mahfar and En Sundararajah s/o Ramasamy, had orally agreed with the second-named defendant, who purportedly is alleged to have acted upon and on behalf of the first-named defendant, inter-alia, that:

(i) the plaintiffs are to act as the first defendant's stockbrokers;

(ii) that all the first defendant's instructions would be given through the second and third-named defendants;

(iii) that the purchase/sale transactions are to be carried out in the name of either: (a) Ng Sing Eng; or (b) Transtasman Ltd (a company registered in Virgin Island) as mere nominees of the first-named defendant.

That two plaintiffs' representatives had acted upon the said *oral instructions* and purchased shares in the names of the said nominees to the value of RM63,603,522.09; as particularized in the schedule annexed to the claim (running for a period 16 October 1996 to 1 May 1998.)

A The plaintiffs claimed against the first-named defendant the said sum of RM63,603,522.09; and *in the alternatively*, against the second and third defendants by virtue of their oral representations and conduct for their having given oral instructions and by their such act warranted that they had the authority to act, and give such instructions on behalf of the first-named defendant; and that as a result thereof, the plaintiffs had now suffered loss B and damages; and wherefore claimed against the *first defendant*:

(i) the outstanding loss of RM63,603,522.09;

(ii) interest of RM9,292,618.79 worked up as at 30 April 1998;

(iii) interest at the rate of 20 per cent on, RM63,603,522.09 with effect C from 1 May 1998 to full realization;

and in the *alternatively* against the second and third-named defendants:

(i) damages for breach of warranty of authority;

(ii) interest on the damages calculated by reference to what the first defendant would have been liable to the plaintiffs, etc. D

The defendants in their defence dated 25 September 1999, categorically and specifically denied each of the paragraphs of the statement of claim; and by para 18 thereof reserved that the defendants strenuously deny the whole of the plaintiffs' claim of any oral representations as alleged to be made in the statement of claim; and prayed that the plaintiffs' claim be dismissed E with costs.

The plaintiffs at the close of pleadings, by encl 7 filed a summons in chambers dated 4 November 1998, asking of the court:

(i) that the defendants' defence be struck off pursuant to O 18 r 19(1)(a) of the Rules of the High Court 1980 as the defence as filed discloses F no reasonable defence; or

(ii) that the defendants' defence be struck off pursuant to the inherent jurisdiction of the court; and

(iii) that with the striking off the defendants defence, the plaintiffs be at liberty to enter judgment against the first-named defendant; or against G the second and the third defendant as prayed for in the statement of claim.

The learned senior assistant registrar made a ruling that the defence as filed was *not* a bare or general defence, but a specific defence; and accordingly dismissed the plaintiffs summons with costs.

H The plaintiffs then appealed to the judge in chambers against the learned senior assistant registrar's decision; and at the hearing of the appeal before the judge; it was by consent of the solicitors withdrawn with no order as to costs; in favour of an early trial date; which was fixed for two days 24 and 25 November 1999.

I On the date of the trial, the plaintiffs' solicitors withdrew the proceedings against the first-named defendant for reasons, that he has been adjudicated a bankrupt vide bankruptcy proceeding in D5–29–2020–99 on

15 October 1999; and *elected not to lead any evidence against the other two defendants*; instead shall submit that the defendants' defence lacked sufficient traverse in the plea, thereby amounting to admissions on the part of the defendants.

The court upon hearing the solicitors submissions, made a finding that as the appellants had withdrawn their appeal on a finding of the senior assistant registrar to the effect that the defence was a specific defence without any clear admission on the part of the defendant; the plaintiffs are now *estopped* from adducing or advancing the same argument to contradict that decision which has now become res judicata; as that point of defence has been adjudicated by the court; and the parties by withdrawing the appeal on that point are now not permitted to relitigate as per his Lordship Dato' Peh Swee Chin FCJ in *Asia Commercial Finance (M) Bhd v Kawal Reliti Sdn Bhd* [1995] 3 MLJ 189.

Further, upon reading the pleadings as filed more particularly the defence, I found that *there were no clear and or unequivocal admissions of any fact by the defendants*; contrary, the plaintiffs were demanded to proof of that claim; and in the face of that finding, the plaintiffs are now not entitled to ask this court, to read the meanings into those pleadings 'as admissions', which upon a fair construction of the defence as a whole, do not appear to be so as such to fix the defendants with an admission — (per Lord Justice Green in the case of *Ash & Anor v Hutchinson & Co (Publishers) Ltd & Ors* [1936] 1 Ch 489 at p 503 — '(the plaintiff) is not entitled to ask the court to read the meanings into his pleading which upon a fair construction do not clearly appear in order to fix the defendants with an admission'.

In the face of this finding that the defence was without admissions; the onus of proof is now shifted to the plaintiff to prove its case; as ss 101 and 102 of the Evidence Act 1950, requires 'whosoever desire any court to give judgment as to any legal right or liability dependant on the existence of facts, which he exerts, *must prove those facts do exist;*' and here the *plaintiff having chosen and elected not to lead the evidence* of the oral agreements through its witnesses; the court could only hold that there was no evidence of the plaintiffs before the court to adjudicate upon; and accordingly dismissed the plaintiffs claim with costs.

Claim dismissed with costs.

Reported by Chin En Tek